Supreme Court, U.S.
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No. 92-1002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHICAGO HOUSING AUTHORITY,
PETITIONER

v.

JEROME HUNT,
RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONERS

Hunt does not seriously contest the importance of the question presented in the petition. Rather, the principal thrust of his opposition is that this case does not involve the issue whether municipal liability may be imposed under § 1983 because of the conduct of only one member of a multi-member policymaking board; Hunt contends that the full CHA Board ordered his discharge, not just Chairman Mooney. Tellingly, however, Hunt cannot point to a single piece of evidence directly supporting his argument. That is because there was no such evidence. Thus, Hunt is reduced to speculating (Br. in Opp. 21) about whether the Board's explicit decision on December 20, 1982 to give him another chance under a revised job description was a "ruse." That is a theory that Hunt did not argue to the jury, that is unsupported by the record and that the court of appeals did not accept. Notwithstanding Hunt's baseless conjecture, it is clear from the record that the full Board did not fire him; as the court of appeals acknowledged, "Mr. Hunt was terminated with the approval of Chairman Mooney and the Executive Director" in May 1983. Pet. App. 6a; see also Pl. Exs. 40-41.

Thus, this case squarely presents the issue stated in the petition: the evidence at trial established unequivocally that Hunt's discharge was approved by only one member (Mooney) of a seven-member Board—without the knowledge or participation of the other six Board members. The Seventh Circuit's decision to impose liability in these circumstances is directly contrary to this Court's precedent and conflicts with decisions in other circuits.

I. HUNT WAS DISCHARGED BY ONE MEMBER OF THE CHA'S BOARD, NOT BY THE FULL BOARD.

Hunt offers two theories to support his argument that the entire seven-member Board ordered his termination: (1) the Board decided to terminate him at its December 20, 1982 meeting, or (2) the Board approved his discharge when it actually occurred, in May 1983. See Br. in Opp. 19-23. There is no evidentiary support for either hypothesis, and both are inconsistent with the decision of the court of appeals.

A. The Board Did Not Decide To Discharge Hunt On December 20, 1982. Hunt admits (Br. in Opp. 20) that the Board "did not explicitly order Hunt's discharge at [the December 20] meeting." In fact, despite his truncated summary of what occurred at the December 20 meeting, Hunt concedes (Br. in Opp. 7) that the full Board agreed at that meeting that he should be given a new job description and a chance to perform under that description, and that any future decisions about his employment would be made solely by Executive Director Beard, who was not a member of the Board. See also Pet. 5-6 (discussing this meeting in more detail). Furthermore, Hunt does not dispute that the Board admonished Beard to "'follow the personnel policies'" in handling Hunt's future employment under the revised job description. *Id.* at 6 (quoting Pl. Ex. 56, p. 20).

Nonetheless, Hunt contends that the entire Board "'officially sanctioned or ordered' * * * Hunt's discharge at the December 20, 1982 meeting" (Br. in Opp. 20), because the Board's express conclusions about Hunt were a "ruse" and a "ploy" (*id.* at 21). In other words, the Board's clearly stated decision *not to fire* Hunt can be interpreted as an order *to fire* Hunt. Such an unfounded interpretation turns both logic and the English language upside down.

It would be bizarre, to say the least, if the stringent standards for imposing § 1983 liability on municipalities could be satisfied by evidence that the final policymakers decided *not* to discharge an employee. If inferences like Hunt suggests were permissible, a § 1983 plaintiff could "establish municipal liability without submitting proof of a single action taken by a municipal policymaker." *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 821 (1985) (plurality opinion). That has never been the law. Rather, this Court has stressed that "'municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives' by city policymakers." *City of Canton* v. *Harris*, 489 U.S. 378, 389 (1989) (quoting *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 483 (1986) (plurality opinion)). A "deliberate choice" by municipal policymakers to violate someone's constitutional rights cannot be established by proof that the policymakers did *not* make

that choice and instead directed a lower-level official to take *different* action.[1]

Nor is Hunt's "ruse" theory supported by the fact that, contrary to the Board's explicit orders, Executive Director Beard did not revise Hunt's job description. See Br. in Opp. 8, 21. The Board's instructions to Beard were crystal clear: he was to "revise the [job] description," give Hunt "a period of time to conform to that job description" and "follow the personnel policies" in exercising his discretion to make future decisions concerning Hunt's employment. Pl. Ex. 56, pp. 19-20. The Board can hardly be faulted for Beard's failure to follow its explicit orders. A local government agency cannot be charged with § 1983 liability when a subordinate official does not comply with the direct orders of the agency's final policymakers. See *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion); *Pembaur*, 475 U.S. at 483 n.12 (plurality opinion).

Hunt's references to "the jury's finding" that the Board's statements at the December 20 meeting were part of an elaborate "ruse" or "ploy" (Br. in Opp. 21) ring especially hollow: Hunt's counsel *never even mentioned the December 20 meeting during closing arguments* to the jury. See Tr. 780-811, 858-73. Hunt's closing argument concentrated on the liability of the individual defendants; his counsel discussed the CHA's liability only briefly, and even then he focused on *Mooney's* conduct. See Tr. 802-04. It was not until the case reached the court of appeals that Hunt advanced his tortured reading of the Board's December 20 order to Executive Director Beard. The court of appeals did not accept

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[1] Hunt attempts to mask the lack of evidence supporting his argument about the December 20, 1982 meeting by relying on colloquies from earlier Board meetings that occurred between February 1981 and early January 1982, when the Board had different members. See Br. in Opp. 4-6, 21. Hunt does not bother to note that *after* these meetings he received a good evaluation, his probationary status was lifted and he got a raise. See Pet. 4. Hunt also ignores the fact that he *repeatedly* asked the Board to fire him and that one such request at the Board's November 1982 meeting prompted the Board's discussion of his job at its next meeting, on December 20. *Id.* at 4-5.

this far-fetched interpretation, and there is no reason for this Court to do so.[2]

B. The Board Did Not Approve Hunt's Discharge In May 1983. As we have shown, there is simply no evidence to support Hunt's assertion (Br. in Opp. 20) that the full Board "'officially sanctioned or ordered'" his discharge on December 20. Thus, the court of appeals concluded that "Mr. Hunt was terminated with the approval of Chairman Mooney and the Executive Director" in May

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[2] Hunt also argues (Br. in Opp. 22 n.13) that the judgment below could be affirmed on the procedural due process claim alone because of Personnel Director Gilmartin's "general[ ]" practice of not conducting pretermination hearings. Tr. 149. There are two flaws with this argument.

First, the evidence on this claim could not possibly support a judgment against the CHA. Gilmartin was the Personnel Director for only five months before Hunt's discharge. Tr. 188-89. Hunt cannot cite any evidence that any other CHA employee was terminated during this short time span. Similarly, there was no evidence of the number of discharged employees, if any, who were improperly denied pretermination hearings in 1983, and there was no evidence that the Board knew that any such employees did not have pretermination hearings. (Contrary to Hunt's brief (Br. in Opp. 22 n.13), there was no evidence that Gilmartin's discharge recommendations said anything about whether or not a pretermination hearing had been held, see Tr. 141). The only evidence that Hunt can point to (Br. in Opp. 22 n.13) is the number of CHA employees and the fact that *if* any other employee terminations had been recommended in 1983 Gilmartin would have reviewed them. That evidence is patently insufficient to satisfy Hunt's burden of establishing a "'persistent and widespread'" practice (*Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658, 691 (1978)) of which the Board "must have been aware" (*Praprotnik*, 485 U.S. at 130 (plurality opinion)).

Even if there were evidence to support the procedural due process claim, the judgment below would still have to be vacated if that were the only claim on which the judgment against the CHA could be sustained. The parties agreed at trial that if the jury found for Hunt only on the procedural due process claim, his actual damages would be limited to $1. Tr. 912-14.

1983. Pet. App. 6a. Moreover, the court went on to hold that "[t]here is *no realistic possibility* that the jury based the CHA's liability on the theory *that the CHA * * * approved the discharge.*" Pet. App. 17a (emphasis added). The record required the court to reach those conclusions: Gilmartin recommended Hunt's termination to Mooney alone, not the full Board (Pl. Ex. 39); shortly thereafter, Mooney sent Gilmartin a handwritten note that said, "*Mr. Beard and I agree* with your recommendation" (Pl. Ex. 40 (emphasis added); see also Tr. 142); and Gilmartin then sent Hunt a memo that said, "*The Chairman [Mooney] has approved* the recommendation of your supervisor and the Director of Personnel to terminate your employment" (Pl. Ex. 41) (emphasis added). Furthermore, while the record contains transcripts of many Board meetings, there is no evidence of a meeting at which the Board approved Hunt's discharge.

Undaunted by this evidence and by the Seventh Circuit's conclusions, Hunt now contends (Br. in Opp. 20) that the judgment against the CHA can be sustained on the theory that the "CHA's Board approved the discharge." The linchpin for this argument is the following testimony quoted in Hunt's brief:

> According to Gilmartin, "[t]he chairman [of CHA's Board] would * * * present to the board * * * all personnel actions * * * [including] terminations" for its approval.

Br. in Opp. 11 (ellipses in original) (quoting Tr. 141). Hunt, however, omitted one key word from Gilmartin's testimony. What Gilmartin actually said was:

> *Generally* the chairman would approve and then present to the board at their next meeting all personnel actions, whether they were employment or terminations or any other ones.

Tr. 141 (emphasis added). And whatever the "general" practice, Gilmartin made clear that *Hunt's* discharge was approved *only* by Mooney and Executive Director Beard, not by the full Board:

> Q: You recommended Mr. Hunt's termination both to Mr. Mooney, the chairman of CHA's board, and to Mr. Beard, the executive director; is that correct?

A: I believe I only recommended the termination to Mr. Mooney.

* * *

Q: And so at least in this case you got approval from both the chairman and at least through him from the executive director; is that correct?

A: It appears that way, yes.

Tr. 141-42. See also Pl. Ex. 40 (Mooney's note that "Mr. Beard and I agree with your recommendation").

In short, there was *uncontradicted* evidence that, as the Seventh Circuit concluded, Hunt "was terminated with the approval of Chairman Mooney and the Executive Director." Pet. App. 6a. There was absolutely no evidence that the other six Board members even knew of, let alone participated in, this decision, and thus, as the court below held, there was "no realistic possibility" that the jury based its verdict on the theory that Hunt now advances. Pet. App. 17a.

* * * * *

As we have demonstrated, it is clear from the record that (1) the Board did not order Hunt's discharge at its December 20, 1982 meeting, and (2) Hunt's discharge in May 1983 was approved by one Board member (Mooney), but not by the other six. There was simply no evidence that the entire Board ordered or approved Hunt's discharge. Thus, there is no doubt that the court of appeals imposed § 1983 liability on a local government agency based on the conduct of only one member of a collective policymaking body. In light of this Court's decisions since *Monell*, the Seventh Circuit's decision is truly inexplicable. The decision below so clearly conflicts with existing precedent—in an area of the law that is of profound importance to local governments across the country—that it should be reviewed.

II. THE CIRCUITS ARE DIVIDED ON WHETHER THE CONDUCT OF ONE MEMBER OF A POLICY-MAKING BOARD CAN SUBJECT A MUNICIPALITY TO § 1983 LIABILITY.

Largely by misreading the Eighth Circuit's decision in *Harris* v. *City of Pagedale*, 821 F.2d 499 (8th Cir.), *cert. denied*, 484 U.S. 986 (1987), Hunt argues that the Eighth Circuit has not really diverged from the Fourth, Fifth and Ninth Circuits on the issue whether the conduct of one member of a multi-member policymaking board is enough to establish § 1983 liability. Even if that were so, however, and the decision in *Harris* were consistent with the decisions by the other circuits, the Seventh Circuit's decision here is not, as we have shown. Thus, whatever the Eighth Circuit's holding in *Harris*, the decision below by itself establishes a split in the circuits and justifies granting the CHA's petition.[3]

In any event, Hunt's contention about the *Harris* decision is simply wrong. As Hunt notes, the cases that the CHA cited from the Fourth, Fifth and Ninth Circuits—*Collinson* v. *Gott*, 895 F.2d 994 (4th Cir. 1990), *Worsham* v. *City of Pasadena*, 881 F.2d 1336 (5th Cir. 1989), and *Lake Nacimiento Ranch Co.* v. *County of San Luis Obispo*, 841 F.2d 872 (9th Cir. 1987), *cert. denied*, 488 U.S. 827 (1988)—consider whether a municipality could be liable for "isolated acts" taken by its officials. Hunt concedes (Br. in Opp. 24) that those "isolated acts" cases hold that "the plaintiff must show that the acts were undertaken by those officials in the municipal corporation who have final policymaking authority—not, for example, by one member of a multi-member policymaking board." By contrast, Hunt argues (Br. in Opp. 26-29), the Eighth Circuit in *Harris* considered whether a municipality could be liable for a "municipal custom" of unlawful conduct. In Hunt's view,

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[3] Hunt is wrong in arguing (Br. in Opp. 15 n.7) that the decision below will be ignored by future courts. While the ruling cannot be cited as precedent in the Seventh Circuit pursuant to local rule, there is no such prohibition in other courts around the country. In this era of computer research, attorneys routinely scour Lexis and Westlaw for decisions that are not available elsewhere, and they do not hesitate to cite those cases.

the rule in such municipal custom cases is somehow different, and does not require culpable conduct by the final policymaker.

The distinction that Hunt draws between "isolated acts" cases, on the one hand, and "municipal custom" cases, on the other, is a distinction without a difference. In either type of case, the final policymaker must be responsible for the constitutional violation. To be sure, in municipal custom cases, the final policymaker need not formally approve the unconstitutional custom. However, for liability to be imposed, the policymaker—not some subset of that policymaker—must know of and acquiesce in that custom. As this Court has made clear, once the trial judge has identified "those officials or governmental bodies who speak with final policymaking authority * * *, it is for the jury to determine whether *their* decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur, *or by acquiescence in a longstanding practice or custom* which constitutes the 'standard operating procedure' of the local governmental entity." *Jett* v. *Dallas Independent School Dist.*, 491 U.S. 701, 737 (1989) (citation omitted; second emphasis added). Accord *Praprotnik*, 485 U.S. at 130 (plurality opinion) (a municipality can be liable when a "series of decisions by a subordinate official manifested a 'custom or usage'" of which a supervising policymaker "must have been aware").

In short, the rule is the same for "isolated acts" cases and "municipal custom" cases. Thus, the Eighth Circuit's decision in *Harris*—holding that individual members of the Board of Aldermen could establish a municipal custom and thereby subject the city to § 1983 liability, *Harris*, 821 F.2d at 506-07—is clearly at odds both with this Court's decisions and the decisions in *Collinson*, *Worsham* and *Lake Nacimiento Ranch*. Because the Seventh Circuit's decision here repeats the Eighth Circuit's error, this Court should grant the CHA's petition to resolve the split in the circuits, and to make clear that § 1983 liability cannot be imposed on a municipality because of the acts of one member of a policymaking body.[4]

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[4] Hunt also argues (Br. in Opp. 27 n.16) that the Eighth Circuit's holding that § 1983 liability could be based on the acts of individual

CONCLUSION

The petition for a writ of certiorari should be granted, and (1) the judgment below should be summarily reversed, or (2) the case should be set for briefing and argument.

Respectfully submitted.

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board members is a holding based on Missouri law, not on § 1983. The decision in *Harris*, however, belies this contention. The defendant there noted that under Missouri law, "the Board exists and can act only as a collective body." *Harris*, 821 F.2d at 506. (See also *Barton County Rock Asphalt Co.* v. *City of Fayette*, 155 S.W.2d 771, 774 (Mo. App. 1941) (because the Board of Aldermen was "the authorized governing body of the city" under state law, purchase orders signed by the Mayor and only one member of the Board were not enforceable against the city)). The plaintiff did not dispute this, but argued that those "statutory requirements * * * are not relevant," because she had "alleg[ed] a municipal custom." *Harris*, 821 F.2d at 506-07. The Eighth Circuit agreed with the plaintiff, upholding a § 1983 verdict based on the jury's finding that "a municipal custom had been established in this case by 'the collective or *individual* actions or inactions of the Board of Aldermen.'" *Id.* at 506 n.9 (emphasis added). This holding could not have been based on state law, but must have resulted from the court's view of § 1983.